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No. 80-575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RANDALL BRENT THOMPSON,

Petitioner,

VS.

NATIONAL RAILROAD PASSENGER CORPORATION and LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JOHN G. LAUGHLIN, JR.
Associate General Counsel
National Railroad Passenger Corp.
400 North Capitol Street, N.W.
Washington, D.C. 20001

HUGH C. GRIFFIN*
LORD, BISSELL & BROOK
115 S. LaSalle Street
Chicago, Illinois 60603
(312) 443-0342

K. HARLAN DODSON
DODSON, HARRIS, ROBINSON & ADEN
P.O. Box 2524
Nashville, Tennessee 37219

Attorneys for Respondents

* Attorney of Record

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, National Railroad Passenger Corporation (Amtrak) and Louisville and Nashville Railroad Company (L&N), respectfully request that this Court deny the petition for writ of certiorari seeking review of the Sixth Circuit's opinion in this case, reported at 621 F. 2d 814.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner seeks review of a Sixth Circuit Court of Appeals decision that is not in conflict with any decision of any other Court of Appeals and is consistent with:

1) every decision that has ever been rendered by this Court on the issue of limitation of liability provisions in free passes issued to railroad employees; and

2) all relevant provisions of the Railway Passenger Service Act (45 U.S.C. §501 *et seq.*) and the legislative history accompanying that Act.

Moreover, the basic factual premise underlying the entire petition—that the L&N Railroad and Amtrak had a contractual obligation to issue petitioner a free pass (Pet., pp. 16, 18, 19, 20, 22, 24, 29)—is directly contrary to the evidence presented in the trial court and before the Court of Appeals. There is no unresolved question of federal law warranting this Court's consideration.

1. Neither The Record Below Nor The Court Of Appeals Decision Raises The Issue Presented In The Petition.

The basic issue that petitioner attempts to raise in this Court was not established or even supported by the evidence presented in this case. In the language of the Court of Appeals (621 F. 2d at 821):

> "Whether a requirement in a collective bargaining agreement that free passes be issued would be sufficient consideration given the rationale of the Supreme Court cases concerning free passes *need not be decided here since there is no such express requirement in the present case.*"
>
> (Emphasis added)

Indeed, the evidence showed that the collective bargaining agreement between the L&N and plaintiff's union did not impose any obligation on the L&N to provide plaintiff or anyone else with a free pass. Rather, it imposed only a uniformity requirement so that to the extent the Railroad chose to issue any free passes to any of its employees, the electrical union employees "will be given the same consideration" (App. II, p. 106)[1] (Ex. 83, p. 24). As stated by the Court of Appeals:

> "This provision only guarantees equal treatment, not that employees shall receive passes" (621 Fed. 2d at 820).

Neither did the agreement between Amtrak and the L&N impose any obligation to issue free passes. On the contrary, §7.5 of the Basic Agreement (omitted from the petition)[2] expressly provided:

> "Transportation privileges, if any, with respect to business and personal travel of railroad personnel *shall be determined by NRPC* (Amtrak)" (App. II, p. 5) (Ex. 1, p. 26) (Emphasis added).

Nor does 45 U.S.C. §565(f) or any other provision of the Railway Passenger Service Act (45 U.S.C. §501 *et seq.*) impose any contractual obligation on Amtrak. Rather, §565(f) (Petition, pp. 2-5) provides that those employees who received free passes from their employer

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[1] All Appendix references are to Appendices filed in the Court of Appeals.

[2] The provision set forth at the bottom of page 18 of the petition applies to "displaced employees" (employees displaced or dismissed due to discontinuance of inner city rail service under 45 U.S.C. §565) and again imposes a uniformity requirement so that such employees are not deprived of any free pass privileges that are available to active service employees during the "protective period" as that term is defined in paragraph 1(d) of the agreement.

railroads prior to April 30, 1971 would in the future receive free passes from Amtrak. The legislative history accompanying the Act stated that "Congress is merely continuing pass policies which the railroads themselves developed" and "restor(ing) to railroad employees, retirees and their dependents pass privileges held on April 30, 1971". 2 *U.S. Congressional and Administrative News* 1972 at 2400, 2396.

The statute expressly authorized Amtrak to issue its passes subject to "a single systemwide schedule of terms" which "reflect terms applicable to the majority of such employees" as of April 30, 1971. 45 U.S.C. §565(f). The most common and significant pre-existing free pass "term" was the repeatedly upheld waiver of liability clause which petitioner acknowledged and executed in obtaining his free ticket in this case (App. II, p. 105). Again, as stated by the Court of Appeals: "Congress was merely restoring rights the employees formerly had, not creating new rights" (621 F. 2d at 820).

2. The Question In This Case Has Not Been "Left Open" By This Court.

Petitioner is in error on the law as well as the facts. The question of the validity of a waiver of liability provision in a free pass issued to a railroad employee in interstate commerce has been answered in the affirmative by this Court in at least five different decisions over a span of forty years. *Boering v. Chesapeake Beach R. Co.*, 193 U.S. 442 (1904); *Northern Pacific R. Co. v. Adams*, 192 U.S. 440 (1904); *Charleston & Western Carolina R. Co. v. Thompson*, 234 U.S. 576 (1914); *Kansas City So. R. Co. v. Van Zant*, 260 U.S. 459 (1923); *Francis v. Southern Pacific Co.*, 333 U.S. 445 (1948). Also, Congress's failure in three-quarters of century to make any

change in the rule announced in these cases, despite numerous opportunities to do so in its enactment and amendment of "free pass" provisions both in the Hepburn Act (Pet. pp. 5-8) and the Railway Passenger Service Act (Pet. pp. 2-5), are "most persuasive indications" of the continuing validity of the limitation of liability provisions, *Francis v. Southern Pacific Co.*, 333 U.S. 445, 450 (1948).

Petitioner is also wrong in his claim that these consistent Supreme Court decisions have led to "divergent results" in the lower courts. On the contrary, the lower courts, both federal and state, have consistently enforced and upheld waiver of liability provisions in interstate railroad passes. *Holeman v. Louisville & Nashville Railroad Co.*, 319 S.W. 2d 47 (Ky. 1958) (upholding waiver provision in an L&N pass), *cert. denied*, 359 U.S. 1012; *Uhlik v. Penn Central R.R.*, 459 F. 2d 460 (6th Cir. 1972); *Gonzales v. Baltimore & Ohio R.R.*, 318 F. 2d 294 (4th Cir. 1963), *cert. denied*, 375 U.S. 911; *Lansford v. Cleveland Union Terminals Co.*, 165 N.E. 2d 3 (Ohio 1960); *Richards v. Atchison, Topeka & Santa Fe R. Co.*, 226 F. Supp. 812, 814 (S.D. Iowa 1964); *Luerson v. Seaboard Air Line R.R.*, 203 F. Supp. 707, 708 (E.D. N.Y. 1962). As noted by the Court of Appeals (621 F. 2d at pp. 822-823), many of these decisions also involved a minor service fee or accommodation charge, and in each case it was held that such a *de minimis* payment does not make a "free pass" any less free, particularly when (as here) the pass holder himself paid nothing. See also *Braughton v. United Air Lines, Inc.*, 189 F. Supp. 137 (W.D. Mo. 1960); *Sims v. Northwest Airlines, Inc.*, 269 F. Supp. 272, 273 (S.D. Fla. 1967).

Petitioner urges an intracircuit conflict with *Martin v. Greyhound Corp.*, 227 F. 2d 501 (6th Cir. 1955), *cert.*

denied, 350 U.S. 1013. But the *Greyhound* case did not involve a railroad pass or any of the judicial and legislative history regarding railroad passes. Further unlike the case at bar, the bus company in *Martin* was contractually obligated to issue plaintiff his pass by a provision in plaintiff's union employment contract (227 F. 2d at 503-504). Also, plaintiff in *Martin* alleged wilful and wanton conduct that was not covered by any liability waiver. In the instant case, petitioner attempted to prove wilful and wanton conduct, but the trial court found against him and the finding was affirmed by the Court of Appeals (621 Fed. 2d at 819).

3. The Decision Below Reflects An Appropriate Application Of Federal Law To Interstate Transportation.

Petitioner claims that continued application of federal law to this issue of interstate transportation is no longer appropriate. But if there has been any change in the federal interest in interstate railroad passenger transportation, it is that the federal interest has increased with the entire nationwide system of passenger trains now being operated, not by the individual railroads, but by Amtrak under federal statutes and substantial federal supervision. See e.g., 45 U.S.C. §§501, 542, 543, 548.

Finally, as noted by the Court of Appeals the result in this case would have been no different even if state law had been applied. 621 F. 2d at 821 n.2.

CONCLUSION

For the reasons stated herein, the Petition For Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit should be denied.

Respectfully submitted,

JOHN G. LAUGHLIN, JR.
Associate General Counsel
National Railroad Passenger Corp.
400 North Capitol Street, N.W.
Washington, D.C. 20001

HUGH C. GRIFFIN*
LORD, BISSELL & BROOK
115 S. LaSalle Street
Chicago, Illinois 60603
(312) 443-0342

K. HARLAN DODSON
DODSON, HARRIS, ROBINSON & ADEN
P.O. Box 2524
Nashville, Tennessee 37219

Attorneys for Respondents

* Attorney of Record